IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JERRY J. IRONS	:	CIVIL ACTION
	:	
v.	:	
	:	
TRANSCOR AMERICA, INC., et al.	:	NO. 01-4328

MEMORANDUM AND ORDER

McLaughlin, J. June 28, 2006

By Order of March 9, 2006, the Court denied the defendants' supplemental motion for summary judgment, in which the defendants argued that they were not state actors subject to liability under 28 U.S.C. § 1983. The defendants have moved for reconsideration of that Order. The defendants have also moved, in the alternative, to certify the Order for interlocutory appeal. Because the United States Court of Appeals for the Third Circuit's decision in Leshko v. Servis, 423 F.3d 337 (3d Cir. 2005) does not change the Court's state action analysis, and because there is not substantial ground for difference of opinion, the Court will deny the motions.

I. Motion for Reconsideration

A court may grant a motion for reconsideration "if the party seeking reconsideration shows at least one of the following

grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999).

The defendants argue that the Court committed clear errors of law by: (1) failing to focus on deliberate indifference to the plaintiff's serious medical needs as the precise alleged constitutional wrong; and (2) finding that there was a genuine question of material fact as to whether prisoner transport was an exclusive state function, where the record did not include evidence regarding the historical practice of the state at issue. Because the defendants' arguments rely primarily upon the Court of Appeals' recent decision in Leshko, the Court will discuss that decision before turning to the merits of the defendants' arguments.

A. State Action Analysis in *Leshko v. Servis*

In Leshko, the United States Court of Appeals for the Third Circuit held that foster parents were not state actors subject to § 1983 liability. 423 F.3d at 338. The court reached this conclusion by "align[ing] the case at hand with the Supreme

Court case most factually akin to it." Id. at 339.[1] The court observed that state action cases divide into two factual categories: (1) those involving "an activity that is significantly encouraged by the state or in which the state acts as a joint participant" (i.e., the "joint participation" cases); and (2) those involving "an actor that is controlled by the state, performs a function delegated by the state, or is entwined with either government policies or management" (i.e., the "exclusive government function" and "nexus" cases). Id. at 340 (emphasis in original). A case involves state action if it fits

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[1] Leshko thus appears to depart from the traditional two-part framework for analyzing state action established by the Supreme Court in Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). The Lugar framework required courts to ask: 1) whether the alleged deprivation was caused by the exercise of a right or privilege created by the state; and then 2) whether private party defendants may be appropriately characterized as "state actors." Id. at 939. Accord Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620-622 (1991).

Following Lugar, the United States Court of Appeals for the Third Circuit held that courts could appropriately characterize defendants as state actors under the "joint participation," "exclusive government function," and/or "nexus" approaches. Groman v. Township of Manalapan, 47 F.3d 628, 639 (3d Cir. 1995); Mark v. Borough of Hatboro, 51 F.3d 1137, 1142-1143 (3d Cir. 1995).

Leshko appears to follow the approach taken by the Supreme Court in Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001). In that case, instead of engaging in the two-part Lugar inquiry, the Supreme Court looked to examples from its precedents to determine whether there was "such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." Id. at 295-296 (internal quotations omitted).

into either category. See id. at 341 (considering actor-centered theories of state action after rejecting activity-centered theories).

The plaintiff in Leshko sued her former foster parents for leaving her unattended near a large pot of extremely hot water when she was a toddler, and for failing to seek medical treatment for her promptly after she pulled the pot over and burned herself. The court concluded that the facts did not align with the first category of cases, which are centered on the activity, because the state did not encourage or jointly participate in the defendants' decisions to leave the plaintiff unattended near the hot water and to not seek immediate medical attention. Id. at 340-341.

The court then considered whether the facts aligned with the second category of cases, which are centered on the actor. The court analyzed whether the defendants were akin to a state agency, whether the operation of the defendants' home was pervasively entwined with public institutions and officials, whether the defendants' status as state employees under state law made them state actors for purposes of § 1983 liability, and whether the provision of care to children in foster homes was a traditionally exclusive governmental function. The court held that foster parents were not state actors under any of these actor-centered theories of state action. Id. at 341-344.

B. Focus on the Alleged Constitutional Wrong

The defendants' first ground for reconsideration is that the Court failed to focus on deliberate indifference to the plaintiff's serious medical needs as the precise alleged constitutional wrong. As part of its activity-centered analysis, the Leshko court asked whether the state had encouraged or jointly participated in the specific alleged wrongs – leaving the plaintiff unattended near the pot of hot water and not seeking immediate medical treatment. Id. at 340-341. Therefore, the defendants argue, the Court should have focused on whether any state encouraged or jointly participated in the specific wrong alleged in this case – deliberate indifference to the plaintiff's serious medical needs.

The defendants' first ground for reconsideration is inapposite. Leshko provides that a plaintiff can establish state action by showing either that the state encouraged or jointly participated in the specific challenged activity (the first category of cases) or that the state controlled or delegated an "exclusive government function" to a particular actor (the second category of cases). Here, the Court's March 9, 2006 Memorandum and Order did not take a position on whether the state had jointly participated in a challenged activity. The Court made its decision under the actor-centered "exclusive government function" approach. (Mar. 9, 2006 Mem.

Op. at 6-9.)[2]

Leshko supports the Court's decision to define the relevant "function" broadly, as prisoner transport. The Leshko court broadly defined the relevant function in that case as the "provision of care to children in foster homes." 423 F.3d at 343. The court rejected narrower definitions, such as daily care for the plaintiff's physical needs, or making the decisions that led to the plaintiff's injuries. Id. The Leshko court chose a

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[2] The defendants appear to have confused the Court's discussion regarding the first prong of the Lugar test with a discussion regarding the first category of cases in Leshko. See Defs' Mem. Supp. Mot. for Recons. at 6-7 (arguing that the Court erred in finding that the plaintiff's alleged deprivations could have been caused by the defendants' exercise of a state-created privilege to transport him, because the Court did not focus on the precise alleged constitutional wrong).

The first prong of the Lugar test is satisfied where the state grants some right or privilege that gives the defendant an opportunity to commit the alleged constitutional violation; the state does not have to encourage or participate in the precise alleged wrong itself. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) (first prong of Lugar satisfied where state permitted peremptory challenges in civil cases, even though state did not engage in precise alleged wrong – racially discriminatory use of those challenges).

As explained in note 1, above, the Leshko court did not engage in the two-part Lugar inquiry; it skipped over the first question of whether the alleged deprivation was caused by the exercise of a state-created right or privilege, and sought to answer the second question of whether the defendants could be characterized as state actors by looking to examples from Supreme Court precedent. Leshko does not hold that plaintiffs must prove that the state encouraged or participated in the precise alleged wrong to satisfy the first part of the Lugar inquiry; if anything, Leshko and Brentwood Academy, 531 U.S. 288, stand for the proposition that plaintiffs no longer need to address that part of the inquiry.

broad approach because the Supreme Court did so in another case that involved allegations of negligent administration of medical care, West v. Atkins. Id.

C. Exclusive Government Function

The defendants' second ground for reconsideration is that the Court erred in finding that the plaintiff raised genuine issues of material fact as to whether prisoner transport was an exclusive government function, where the plaintiff did not provide evidence regarding the historical practice of the state at issue. The defendants have not identified a manifest error of law.

Leshko and the Supreme Court case that it follows, American Manufacturers Mutual Insurance Co. v. Sullivan, 526 U.S. 40 (1999), surveyed state historical practices before concluding that the functions in question had not exclusively belonged to the government. Id. at 55-57; 423 F.3d at 343-345. Neither case, however, held that courts must grant summary judgment in favor of defendants, where, as here, neither party provided evidence regarding the historical practices of the relevant jurisdiction. Furthermore, in West, the Supreme Court concluded that the provision of medical care to prisoners was an exclusive government function because such care was required under the federal constitution and state common law; the Court did not

engage in a lengthy discussion of the state's historical practices. See 487 U.S. at 54-55; Leshko, 423 F.3d at 344.[3]

At oral argument, defense counsel argued that prisoner transport is not an exclusive state function by pointing to a passage in the February 19, 2002 Opinion of the Ohio Attorney General. (May 10, 2006 Hr'g Tr. at 8, 38-39.) That passage states that an Ohio "prosecuting attorney, unlike a county sheriff who has been ordered by a court or the Governor to transport a person to Ohio, does not have a duty to transport from another state to Ohio a person who has waived extradition." 2002 Ohio Op. Atty Gen. No. 2, 2002 Ohio AG LEXIS 2 at *13 n.3.

An Ohio prosecuting attorney might not have a duty to personally transport a detainee back to Ohio. A prosecuting attorney might even choose, in the exercise of his or her prosecutorial discretion, not to bring a detainee back for

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[3] In their reply brief, the defendants also argue that § 1983 plaintiffs must show that defendants engaged in conduct pursuant to a "clearly articulated and affirmatively expressed state policy," citing Nat'l Collegiate Ath. Ass'n v. Tarkanian, 488 U.S. 179, 195 n. 14 (1988). Defs' Reply Br. Supp. Mot. for Recon. at 2, 4.

The Supreme Court did not so hold. The quoted language comes from Hoover v. Ronwin, 466 U.S. 558, 569 (1984), which dealt with whether persons appointed by the Arizona Supreme Court to administer bar examinations were exempt from liability as "state actors" under the Sherman Act. The Tarkanian court quoted the language from Hoover for the limited purpose of comparing it with the language in Lugar that a § 1983 plaintiff's alleged deprivation "must be caused by the exercise of some right or privilege created by the State . . . ." 488 U.S. at 195 n. 14.

prosecution. The Court finds, nevertheless, that when a prosecuting attorney does choose to have someone transported, and appoints an agent to effect that transport, that transport occurs under color of state law.

The authority of state executives to demand the extradition of fugitives who have fled to other states was established by the Constitution and the original Extradition Act of 1793. U.S. Const. art. IV, § 2; P.R. v. Branstad, 483 U.S. 219, 224, n.2 (1987). The modern day Extradition Act, enacted in 1945, provides that the arresting state may discharge the fugitive if the demanding state does not send an agent to pick him up within thirty days of his arrest. 18 U.S.C. § 3182. In addition to federal law, several interstate compacts establish the procedures for the extradition of prisoners and detainees.

"It is well settled, however, that a person may waive extradition, and voluntarily consent to his transfer from one state to another." 2002 Ohio Op. Atty Gen. No. 2, 2002 Ohio AG LEXIS 2 at *9. When a person waives extradition, an Ohio prosecuting attorney may designate an agent to return the person to Ohio. Id. Any costs associated with transporting the person to Ohio must be paid by the demanding county. Ohio Rev. Code. Ann. § 307.50 (2006) ("When . . . the prosecuting attorney of any county in the state seeking the return of a felon has received notice of waiver of extradition, the board of county

commissioners may pay, from the county treasury to the agent designated . . . all necessary expenses of pursuing and returning the person so charged, or so much of such expenses as seem just."); Lapeer County v. Montgomery County, 108 F.3d 74, 77 (6th Cir. 1997) (phrase "may pay" in § 307.50 of Ohio Revised Code authorizes and requires county to pay; Ohio county cannot refuse to pay medical expenses incurred by Michigan county in pursuing an Ohio felon), citing 1972 Ohio Op. Atty Gen. No. 105.

The defendants further argue that they cannot be state actors because the State of Ohio never delegated its obligation to provide the plaintiff with adequate medical care to TransCor. The defendants have misidentified the government function at issue. In accord with West and Leshko, the Court has broadly defined the relevant function in this case as prisoner transport.

The plaintiff has at least raised a genuine question of material fact as to whether the Cuyahoga County, Ohio prosecutor's office delegated the function of prisoner transport to TransCor, and whether TransCor accepted that delegation, where the prosecutor's office placed an "Order" with TransCor, and TransCor attempted to fulfill it.[4] (Defs' Mot. for Summ. J. Ex.

[4] At oral argument, defense counsel again raised the argument that temporary transport custodians are not obligated to provide medical care. (May 10, 2006 Hr'g Tr. at 23). In its March 9, 2006 Memorandum and Order, the Court rejected that argument without prejudice on the grounds that it exceeded the scope of the additional briefing permitted by the Court. (Mar. 9, 2006 Mem. Op. at 2 n.2.) Even if the Court were to consider

B (Order Detail)). The plaintiff has therefore at least raised a genuine question of material fact as to whether TransCor and its employees were acting under color of state law during the time that they transported the plaintiff.

II. Motion for Interlocutory Appeal

The defendants move, in the alternative, for the Court to certify the March 9, 2006 Order for interlocutory appeal. A district court may certify an order for immediate appeal if: (1) the order involves a "controlling question of law;" (2) there is a "substantial ground for a difference of opinion" as to the order's correctness; and (3) an immediate appeal will "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir. 1974).

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that argument now, the Court would find that there is a genuine question of material fact as to whether the defendants' custody was "temporary," where the record shows that the defendants transported the plaintiff across several states over six days.

Nor is the Court persuaded by defense counsel's comparison of the defendants' actions to citizen's arrests, which generally are not considered state action. In the usual citizen's arrest case, a private citizen detains a suspected criminal without any assistance from the state until the police arrive. Here, the record shows that the plaintiff was detained by Maryland officials, who alerted the Ohio officials, who then asked TransCor to be their agent in transporting the plaintiff back to Ohio. There is no evidence that the defendants would have even known of the plaintiff's existence absent the actions taken by state officials.

The defendants propose two questions for immediate appeal: (1) whether in an "under color of law" analysis under 42 U.S.C. § 1983, it must always be determined that the state significantly encouraged or participated in the precise alleged constitutional wrongs – here, the defendants' decisions that allegedly constituted deliberate indifference to the plaintiff's medical needs; and (2) whether a "state actor" analysis based on the "exclusive government function" test must always be determined by the historical practice of the state at issue.

With regard to the first question, the Court has concluded that Leshko requires courts to determine whether the state significantly encouraged or participated in the precise alleged constitutional wrongs when state action is based on an activity-centered "joint-participant" theory, but not when state action is based on an actor-centered "exclusive government function" theory, as it is here. With regard to the second question, the Court has concluded that although a survey of the historical practices of the state at issue may be helpful, neither the Supreme Court or the United States Court of Appeals for the Third Circuit has held that plaintiffs must provide such a survey to survive summary judgment on the exclusive government function theory.

Even if the Court assumes that the defendants have raised controlling questions of law, the Court finds that there

is not a substantial ground for difference of opinion as to the Court’s resolution of those questions.

An appropriate Order follows.

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ORDER

AND NOW, this 28th day of June, 2006, upon consideration of the defendants' Motion for Reconsideration (Doc. No. 105), the plaintiff's opposition, and the defendants' reply thereto, and after oral argument on May 10, 2006, it is HEREBY ORDERED that the defendants' motion is DENIED for the reasons stated in a memorandum of today's date.

IT IS FURTHER ORDERED that, on or before July 12, 2006, the parties shall inform the Court whether they wish the Court to re-refer the case to Magistrate Judge David R. Strawbridge for a settlement conference.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.